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IN THE

Supreme Court of the United States

October Term, 1967

No.....

JOHN P. PARRISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

John P. Parrish, by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 5, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, *infra,* pp. 6-9) is not yet officially reported. No opinion was given by the United States District Court. The judgment of the United States District Court is set out in the Appendix B, p. 28.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1968. (Appendix B, pp. 6-9.) On February 14, 1968 Petitioner filed in the Court of Appeals a petition for a rehearing En Banc and a motion to stay the mandate. (Appendix B, p. 30.) On February 19, 1968 the Court of Appeals entered an order staying the issuance of a certified copy of the judgment in lieu of the mandate. (Appendix B, p. 31.) On March 11, 1968 the Court of Appeals denied the petition for rehearing En Banc. (Appendix B, p. 32.) Under Rule 22(2) of the Rules of this Court this petition may be filed within 30 days from March 11, 1968, the date of the final order entered below which includes April 10, 1968. On April 3, 1968, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including April 30, 1968.

This Court has jurisdiction under Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

I. Whether Petitioner's constitutional rights protected by the Fourth, Fifth and Sixth Amendments were violated by fraud, deceit and misrepresentation practiced by the agents of the United States in the conduct of their investigation which produced the evidence used to convict petitioner.

II. Is a defendant on trial in the District Court entitled, upon his own specific request, to have the jury asked on *voir dire* whether the fact that he is Jewish makes it more difficult for them to render a verdict in his favor?

III. Whether the indictment of petitioner was fatally defective in the following respects:

A. In the charging a conspiracy to violate Section 1952, Title 18 U.S.C. where the state crime is bribery and the only persons involved were the briber and bribed

B. Where there was *no* charge of an overt act to effect the object of the conspiracy during the pendency of such conspiracy

C. Whether a charge couched solely in the language of the statute without alleging facts with reasonable particularity of time, place and circumstance is sufficient

D. Whether it is duplicitious to charge in a single count two persons each being charged with having committed a different offense.

IV. Whether Section 1952 of Title 18 requires the use of interstate facilities and "thereafter" some act proscribed by the statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments. The Federal Statutory provisions are Sections 1952, 371 and 2 of Title 18, United States Code. Sections 18.1-278 and 18.1-279 of the Code of Virginia are involved.

All of the constitutional amendments and statutes involved are set out in Appendix A, *infra.*

STATEMENT

This is a prosecution of John P. Parrish and Isadore Parzow under a two-count indictment charging conspiracy to violate the provisions of Title 18, Section 1952, United States Code, and a substantive violation or violations of the same statute. The District Court which tried the case in the

first instance had jurisdiction by virtue of Section 3231 of Title 18.

John P. Parrish is an attorney practicing in Fairfax County, Virginia, and was a member of the Board of Supervisors of Fairfax County, Virginia, from June 9, 1960, until shortly after the return of the indictment against him, at which time he requested a voluntary suspension. Isadore Parzow is a real estate developer with offices in Washington, D. C. during the times mentioned in the indictment.

Parrish and Parzow formerly occupied offices in the same building in Alexandria, and at one time the offices were on the same floor. They were friendly and Parrish did work for Parzow on occasion. Parzow was interested in Kent Washington, a real estate development corporation, and in October, 1961, Parrish, through his corporation, Commonwealth Greeting Service, bought stock in Kent Washington —some through Balogh and Company, brokers in Washington, and some through another broker.

In December, 1961, Parrish's office received employment from Parzow and associates in connection with the closing of the purchase of real estate in Fairfax County, Virginia, at the intersection of Braddock and Backlick Roads. Parrish recommened another attorney, Lytton Gibson, to the Parzow group to handle the rezoning of this property in order to enable them to build a shopping center. The application for rezoning was filed and a public hearing was held on July 26, 1962, at which time Parrish, as a member of the Board of Supervisors of Fairfax County, Virginia, voted in favor of the rezoning application. Parrish knew such rezoning was against the Annandale Master Plan, but he had never favored this plan, and thought it represented poor planning.

On July 23rd, 1962, Parrish went to see Parzow in Washington, and there discussed the possible purchase of

more Kent Washington stock. It was agreed between them that Parzow would purchase 1000 shares of this stock, through his brother, who was a salesman for Balogh and Company and Parrish executed his negotiable promissory note in the amount of $5,000.00, a copy of which was later furnished to the Revenue Agent and put in evidence by the Government. Parzow was to advance the purchase money, and the stock certificates were to be endorsed and left with Parzow as security for the loan. Parzow placed the order with Balogh's representative, his brother, and the 1000 shares of Kent Washington stock were purchased in five transactions, the first one being July 31, 1962, and the last one being August 13, 1962. The confirmation for the purchase of July 31, 1962 was mailed by Balogh and Company to Parrish in Alexandria, Virginia. This was contrary to instructions left at the time of purchase, and future confirmations were delivered to Parzow, Balogh's employee. On August 17, 1962, Balogh and Company mailed the stock certificates to Parrish at 515 Wythe Street, Alexandria, Virginia, and Parrish signed the receipt for the same and returned it. He then endorsed the certificates in blank and delivered them to Parzow, to be held as security for the note.

The shares in Kent Washington were sold in early 1966 by Parzow. There is still a balance due by Parrish to Parzow on the note, no payments having been made, except the credit from the sale of the 1000 shares of stock.

REASONS FOR GRANTING THE WRIT

I.

Violation of the Fourth, Fifth and Sixth Amendments

Parrish contended in the courts below that his constitutional rights have been violated and, therefore, the evidence

used to convict him should have been suppressed. He maintained that the investigation which led to his conviction was criminal in nature from its inception, and that although it purported to be a routine tax audit conducted by the Internal Revenue Service, in fact, the tax audit was a guise to cover up the true purpose of the examination of his books and records and the interrogations to which he was subjected. Affirmative misrepresentations made to Parrish by the Internal Revenue agents were calculated to deceitfully conceal the fact that he was under criminal investigation.

The following facts were undisputed by the government in the Court of Appeals (See Appendix B, pp. 33-35, for the findings of fact of the trial court.)

In 1963 a group of Internal Revenue Agents and Special Agents was assembled in Fairfax County, Virginia, to work on a special assignment known as the Metro-project. The purpose of the group was to investigate alleged corruption of public officials in Northern Virginia through bribery and payoffs.

The group worked under the direction of an attorney in the Organized Crime Section of the Criminal Division of the Department of Justice.

The plan of operation of the Metro-project group was to conduct audits of the income tax returns of various public officials and other selected prominent persons in Northern Virginia and by this means gather all of the evidence and information available with the intent of discussing it, assimilating it, and going over it with a fine tooth comb to evaluate it to see what indictments, if any, could be presented.

Defendants John P. Parrish and Isadore Parzow were among those whose income tax returns were audited. The audit was conducted by Internal Revenue agent, Benjamin

I. Sondac. Mr. Sondac questioned Mr. Parrish many times and obtained information and evidence from Mr. Parrish, including evidence upon which the indictment in this case was returned. He also questioned Mr. Parzow and obtained evidence from him. At no time did Mr. Sondac advise Mr. Parrish or Mr. Parzow that they were under criminal investigation or in any other way advise them of their constitutional rights.

In the course of the income tax audit, it was discovered by Mr. Parrish's accountant around September, 1965, that Mr. Sondac had microfilmed certain records of Mr. Parrish. The accountant, Arthur J. Bruner, demanded to know the meaning of the microfilming from Mr. Sondac's supervisor, Kenneth E. McElroy. When advised that his records had been microfilmed, Mr. Parrish also protested to Mr. McElroy.

Mr. McElroy was a special agent in the Intelligence Division of the Internal Revenue Service, but he did not disclose his identity until March, 1966, at which time he advised Mr. Parrish that he was under criminal investigation and that he had certain constitutional rights.

During the interim period from September, 1965 to March, 1966, Mr. Sondac continued his investigation and continued his questioning of Mr. Parrish and his accountant. His investigation dealt in part with Mr. Parrish's acquisition of the Kent Washington stock, which acquisition was the alleged bribe paid by Mr. Parzow to Mr. Parrish. The ownership of the Kent Washington stock was discovered by Mr. Sondac through his investigation of Mr. Parrish.

Immediately upon learning that he was under criminal investigation, Mr. Parrish employed an attorney to represent him and shortly thereafter, brought a suit in the United States District Court for the Eastern District of

Virginia to protect his constitutional rights by suppressing the use of all information and evidence obtained from him through the illegal search and seizure. (See *Parrish* v. *United States,* 256 F.Supp. 793 (D.C. E.D. Va., 1966).) The District Court refused to hear the evidence in the case and dismissed it on the motion of the United States on the ground that it was premature. An appeal was taken to the Court of Appeals but it was also dismissed, this time on the ground that the District Court's order was not a final order, hence unappealable. (See *Parrish* v. *United States,* 376 F.2d 607, (C.A. 4, 1967).) While the appeal was pending, Mr. Parrish was indicted in this case. Another indictment was also returned against Mr. Parrish and others. That charge has been dismissed by the United States District Court for the Eastern District of Virginia sitting in Norfolk.

A principal government witness in this case was Benjamin I. Sondac who testified concerning his investigation of Mr. Parrish and Mr. Parzow and the transaction between them involving Mr. Parrish's acquisition of the Kent Washington stock. Mr. Sondac testified in detail to the facts given him by Mr. Parrish and Mr. Parzow.

Among the pretrial motions filed by the defendants in this case were motions to suppress the use of all evidence illegally obtained by the United States and all evidence obtained through leads of such illegally obtained evidence.

After hearing the evidence on the motions, the District Court refused to suppress the use of the evidence. At the trial of the case, the motion to suppress was again made and overruled by the Court.

Based upon the foregoing statement of facts, it was Parrish's argument that the agents of the United States conducted an investigation of him, criminal in nature from its inception, for the purpose of gathering all of the informa-

tion and evidence available which they intended to sift and evaluate with a fine tooth comb to see with what crime he could be charged. The agents purposely conspired among themselves to conceal and cover up the true purpose of their investigation by conducting such investigation under the guise of a routine tax examination. The use of Internal Revenue agents to conduct a criminal investigation to determine whether the defendant committed any crime of any nature was in flagrant violation of the Constitution of the United States.

As earlier stated, the facts were undisputed by the United States in the Court of Appeals. The Government's contention was that Parrish did not object to the admission of the illegal evidence when it was offered at the trial. The record is clear that the evidence was admitted over Parrish's objection. The United States also contended that it used no evidence of which Parrish complained, but the record is also clear in this regard. The most crucial evidence—the note Parrish gave to Parzow—was obtained from Parrish by Internal Revenue Agent Sondac.

The Court of Appeals did not mention in its opinion the constitutional questions petitioner raised and, therefore, one can only speculate as to the reasoning of that Court.

The law is clear that information obtained from a defendant by fraud, deceit or misrepresentation cannot be used against him because such evidence is obtained in violation of his constitutional rights under the Fourth and Fifth Amendments. *Gouled* v. *United States*, 255 U.S. 305 (1921); *Boyd* v. *United States*, 116 U.S. 616 (1886); *Abel* v. *United States*, 362 U.S. 217 (1960).

In-custody interrogations have been condemned, *Escobedo* v. *United States*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966), as violations of the Sixth Amendment and it seems plain that an interrogation con-

ducted under a deliberate misrepresentation as to its purpose likewise violates the Sixth Amendment.

Recently some District Courts have held that when a routine civil tax audit turns into a criminal investigation, the taxpayer must immediately be advised of his right to counsel. *United States* v. *Turzyrski*, 268 F.Supp 847 (N. D. Ill. 1967); *United States* v. *Kingry*, 67-1 U.S.T.C., par. 9262, 19 AFTR 2d 762 (N.D. Fla., 1967); *United States* v. *Schoenburg*, 67-1 U.S.T.C. par. 9393, 19 AFTR 2d 348 (D. Ariz. 1966). Mr. Justice Douglas dissented from denial of certiorari in *Thomas* v. *United States*, 286 U.S. 975, 87 S.Ct. 1164, 18 L.Ed. 2d 133 (1967), with the observation that, "This is not an in-custody case, but a coercive examination of a taxpayer at a critical preliminary hearing, so to speak, and the question presented is a recurring one." *U.S.* v. *Wainwright* ..... F.Supp ....., 21 AFTD 2d 1039 (D.C. Colo., 3/11/68) is a recent case which fully approves Judge Wills' opinion in *Turzyrski*.

Contrary to the above cases there are many cases, of which *Kohatsu* v. *United States*, 351 F.2d 898 (C.A. 9, 1965) cert. den. 384 U.S. 1011 is probably the most cited, holding that the *Escobedo* and *Miranda* requirement for the rendition of advice as to the right to counsel does not extend to the situation of a precustody Internal Revenue Service inquiry.

We do not think that any of the above cases control the present case because in all of them what was in fact a routine tax audit developed into a criminal tax case while in this case Parrish was under criminal investigation from the start—not necessarily for tax evasion, but for any charge which could be developed against him. (See the trial Court's findings of fact, Appendix B, pp. 33-35.)

We cite the above cases because if the District Courts are correct, a fortiori, Parrish's contention is valid and his conviction must be reversed.

There have been many many cases in which defendants have claimed their constitutional rights have been violated by illegal searches and seizures and illegal interrogations which elicted evidence. In those cases where the such claims have been rejected the courts seem to be unanimously consistent in pointing out that there was no fraud, deceit, trickery or misrepresentation practiced by the government agents. The facts in the present case would not support such a disavowal of wrongful motives on the part of the government agents. Any opinion on the constitutional issue of necessity would have to admit the wrongdoing by the agents because the United States in failing to deny the facts tacitly admits the violations of the Constitution.

The Court below erred in failing to reverse the District Court's judgment on the constitutional ground and compounded its error by ignoring petitioner's argument in this respect and brushing it aside without stating a single reason (nay without even acknowledging that it had been sincerely and earnestly submitted by counsel) to support its action.

II.

Failure of the Court to Ask the Prospective Jurors if They had any Prejudice Against Jews.

The Court refused to ask the jurors on *voir dire* whether the fact that one of the defendants was Jewish would make it more difficult for them to render a verdict in his favor. The specific questions requested were:

> "22. Would the fact that one of the defendants is Jewish make it more difficult for you to render a verdict in his favor?
>
> "23. Would any of the prospective jurors be more inclined to find the defendants guilty because one of them is Jewish?"

Defendant Parzow was Jewish and the crime charged was such that the jury could hardly find one defendant guilty while acquitting the other.

The refusal to question the prospective jurors as to their possible prejudice against Jews was reversible error. See *Aldridge* v. *U.S.*, 238 U.S. 308; *Frazier* v. *U.S.*, 267 F.2d 62, 66; *Smith* v. *U.S.*, 262 F.2d 50; *U.S.* v. *Daily*, 139 F.2d 7; *Potter* v. *State*, 86 Tex. Crim. App. 380, 216 S.W. 886; *Horst* v. *Silverman*, 20 Wash. 233, 55 Pac. 52; and Annotation at 54 ALR 2d 1215.

The Court of Appeals handled this issue in its opinion exactly as it did the constitutional questions. It said nothing. It did not even state that the question had been raised.

Petitioner does not care to speculate why the Court below ignored this issue as it did the constitutional one but he does complain to this Court that where serious arguments based upon Supreme Court decisions are advanced in a respectful manner by his counsel, he is entitled as a citizen to some opinion as to the validity of such arguments.

Here the Court of Appeals has not tried to distinguish the cases cited by petitioner, has not said that the arguments are frivolous or meritless, has not even set out the facts either as petitioner believes them to be (the government does not dispute them) or as the Court found them to be (if they varied from those stated by petitioner).

In view of the failure of the Court below to come to grips with this important question it is urged that a writ of certiorari be granted so that it may properly be decided.

III.

The Indictment is Fatally Defective

A. COUNT ONE PURPORTS TO CHARGE A CONSPIRACY BETWEEN ONE PERSON, THE BRIBER, AND ANOTHER PERSON, THE BRIBED, TO USE INTERSTATE FACILITIES WITH THE INTENT TO CARRY OUT SUCH BRIBERY AND THEREAFTER PERFORM AN ACT TO CARRY OUT SUCH BRIBERY. SUCH ACTION IS NOT INDICTABLE AS A CONSPIRACY.

Count One of the indictment reads as follows:

"The Grand Jury Charges:

"That from on or about November 1, 1961 and continuing until January 1, 1963, in the Eastern District of Virginia and within the jurisdiction of this Court, the defendants

John P. Parrish and Isadore Parzow

did unlawfully, willfully and feloniously conspire, confederate and agree with each other and with others to this Grand Jury unknown, to commit offenses against the United States, to-wit: to violate Section 1952 of the Title 18, United States Code; that is to say, to use and cause the use of facilities in interstate commerce including the mails, and to travel in interstate commerce, to establish and carry on and facilitate the establishment and carrying on of an unlawful activity by the bribery of officers of the Commonwealth of Virginia in violation of the laws of the Commonwealth of Virginia, to-wit, Title 18.1-278 and 18.1-279 of the Code of Virginia.

"That at all times hereinafter pertinent the defendant Isadore Parzow was an officer and stockholder of Builders and Developers Corporation.

"That at all times hereinafter pertinent the defendant John P. Parrish was a member of the Fairfax

County Board of Supervisors and as such was charged with the responsibility of voting on applications for zoning of property in Fairfax County.

"That it was the plan of the said conspiracy that the objects and the purposes of the said conspiracy would be accomplished by the following manner and means:

"1. That Builders and Developers Corporation, acting through its attorney, Lytton Gibson, would apply for the rezoning of 12.4 acres of land in Fairfax County from residential (RE0.5) to Commercial (C-D).

"2. That defendant John P. Parrish would vote for rezoning of the said property.

"3. That the defendant Isadore Parzow would purchase 1,000 shares of stock in Kent Washington Corporation for the benefit of John P. Parrish.

"4. That the defendant John P. Parrish would accept the said shares of stock in return for his favorable vote.

"5. That the defendants would use and would cause others to use the United States Mails between Arlington, Virginia and Washington, D. C. in order to effectuate the said conspiracy.

"6. That the defendants would cover up and conceal the nature and purposes of the conspiracy and the acts and declarations in furtherance thereof.

OVERT ACTS

"That the defendants would, in order to carry out the said conspiracy, commit the following and other overt acts within the jurisdiction of this Court and elsewhere:

"1. On or about July 26, 1962 defendant John P. Parrish voted in favor of rezoning the Builders and Developers Corporation property.

"2. On or about August 17, 1962 defendant John P. Parrish did accept delivery of 1,000 shares of Kent Washington Stock. All in violation of Title 18, United States Code, Section 371."

* * *

Section 371 of Title 18 of the United States Code, alleged to have been violated by this Count One, may be paraphrased as follows:

"If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of a crime."

By the indictment the defendants were alleged to have conspired to violate Section 1952 of Title 18 of the United States Code. Insofar as is applicable to this case, that section may be paraphrased as follows:

"Whoever uses any facility in interstate commerce, including the mail, with the intent to promote or carry on bribery in violation of Title 18.1-278 and 18.1-279 of the Code of Virginia and thereafter performs any act to promote or carry on such bribery shall be guilty of a crime."

It is to be noted that to violate Section 1952 of Title 18 of the United States Code a person must not only travel in, or use facilities of, interstate commerce with the intent to carry on an illegal activity (bribery) but must also, thereafter, perform an act to promote or carry on such illegal activity (bribery).

To conspire, in violation of Section 371, to commit the offense defined in Section 1952, a person must therefore conspire to commit the offense of bribery (after using facilities of interstate commerce with the intent so to do).

The plan of the conspiracy as set forth in Count One of

the Indictment (and the only plan of alleged conspiracy sought to be established by the evidence) was that the defendant Parzow would offer a bribe to defendant Parrish and that defendant Parrish would agree to accept such bribe. Count One of the Indictment does not charge that the defendant Parrish and the defendant Parzow conspired together to bribe a third party—the charge is that Parrish himself was the officer to be bribed. The ultimate substantive offense the defendants were charged with conspiring to commit thus, necessarily involved the cooperative action of both defendants. The law is clear that such an offense cannot be made the subject of a charge of conspiracy on the part of the two participants.

Where it is necessary, to commit a substantive offense, to have the cooperative action and agreement among the actors, the participants may not be charged as conspirators. Those crimes which, by their very nature, require interaction of two or more persons are not punishable as conspiracies. See *Gebardi* v. *United States*, 287 U.S. 112; *United States* v. *Holte*, 236 U.S. 140; *United States* v. *Katz*, 271 U.S. 354; Anderson's *Wharton's Criminal Law and Procedure*, Vol. 1, Section 89; and *Developments In The Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 953-956.

That this principle applies to bribery cases involving the offeror of the bribe and the acceptor of the bribe is clear. See *United States* v. *Dietrich*, 126 Fed. 664, 666-7; People v. *Wettengel*, 98 Colo. 193, 58 P. 2d 279; *United States* v. *Sager*, 49 F.2d 725, and *United States* v. *Burke*, 221 Fed. 1014, where the court at page 1015 said, "it is well recognized that, in a crime such as bribery, where the participation of at least two persons is necessary and concert of action is essential to the offense, an indictment will not lie charging a conspiracy to commit such an offense."

Under Section 18.1-278 of the Virginia Code it is the very act of *offering* a bribe to an officer which constitutes the crime of bribery and the crime is complete when the *offer* is made, not when the payoff is made. See *Ford* v. *Commonwealth*, 177 Va. 889. Under Section 18.1-279, the acceptance by the officer of the offer of the bribe is the completed offense, not the receipt of the promised payoff. How then, can the agreement consisting of the offer to pay the bribe for the favorable vote and the acceptance of such offer with the promise to deliver the favorable vote, which constitutes the substantive offense, itself, be also the subject of the separate offense of conspiracy to commit the substantive offense? To permit such a result would be to permit the government to try twice for the same offense in the same indictment under separate counts.—This would be the ultimate in the perversion of the rule against double jeopardy.

The Court of Appeals did not disagree with the proposition that the offeror of a bribe and the acceptor of the bribe cannot be indicted for conspiring to commit bribery. In answer to petitioner's argument, the Court of Appeals said:

> "The Appellants urge that a charge of conspiracy to commit bribery cannot be maintained when the only persons involved are the persons who give and who receive the bribe. They place great reliance on cases which hold that where cooperative action is necessary to commit the substantive offense, a preliminary agreement between the same parties to commit the offense cannot be punished as a conspiracy,[2] but their reliance is misplaced. We have no occasion now to question the thrust of those cases for, as we pointed out in *Wechsler*, the defendants are not charged with a conspiracy to commit bribery, but rather with a conspiracy to violate § 1952." (Appendix B, p. 8) (Footnote citing cases relied on by Parrish is omitted.)

The Court of Appeals, however, failed to analyze § 1952 and gave no significance to the fact a violation of § 1952 consists of *two* elements: one, the use of interstate facilities with certain intent; the other, the performance of an act to carry out the illegal activity—which in this case was the crime of bribery committed by the one offering the bribe and the one agreeing to accept the bribe. So here, an act toward bribery is one of the elements of § 1952.

In order to be guilty of conspiring to violate § 1952, the parties must conspire to violate all of the elements of that section.

Its opinion makes it apparent that the Court of Appeals thought Parrish argued only that two persons cannot conspire to commit bribery with each other alone, and it missed the real point of the argument that to conspire to violate § 1952 you must conspire to violate each element of the crime, and in this case there can be no conspiracy to commit bribery.

Two persons can conspire all they want to use the interstate facilities, but until they conspire to do the act proscribed, they do not violate § 1952. Where, as here, the parties cannot conspire to commit bribery, they cannot be found guilty of conspiring to violate § 1952.

The Court of Appeals was clearly in error in its interpretation of § 1952 and its judgment should be reversed.

B. Count One Fails to Allege That Any of the Persons Charged With the Conspiracy Did Any Act to Effect the Object of the Conspiracy as Required by Section 371.

In our argument under the first point of this section of our petition we set forth the substance of Section 371 of Title 18, U.S.C. To constitute a violation of this section, two or more persons must not only agree to commit an

offense against the United States, but one of them must do some act to effect the conspiracy. Count One of the Indictment fails to charge such an act and is for this reason, fatally defective.

What we are concerned with here is the failure of Count One to charge the commission of an overt act *after* the alleged conspiracy or agreement to commit the offense against the United States was entered into.

It is clear that under Section 371 of Title 18 it is necessary to aver and prove an overt act in order to complete the offense of conspiracy. *Fiswick* v. *United States*, 329, U.S., 211, *Hudspeth* v. *McDonald* 120 F.2d 926, Cert. den. 314 U.S. 617, *Rivera* v. *U.S.*, 57 F.2d 816, and *U.S.* v. *Noble*, 18 F. Supp. 808.

The only overt acts charged in the indictment are that "On or about July 26, 1962, defendant John P. Parrish voted in favor of rezoning the Builders and Developers Corporation property" and that "On or about August 17, 1962, defendant John P. Parrish did accept delivery of 1000 shares of Kent Washington Stock."

Neither of these was an "act to effect the object of the conspiracy" since the object of the conspiracy, *the only conspiracy constituting a crime under the Federal statute,* if such conspiracy in fact existed, *had already been accomplished.*

It must be remembered that *the* conspiracy made punishable by Section 371 must be a conspiracy to commit an offense against the United States. This section does not embrace *any* conspiracy that may be entered into. For instance, a conspiracy to obtain the rezoning of a tract of land would not, itself, be a violation of this section.

Insofar as this case is concerned, the only indictable conspiracy was the alleged conspiracy to use the facilities of interstate commerce with the intent to commit bribery in

violation of the law of Virginia and thereafter to perform an act to promote such bribery.

Now under Virginia law, what is bribery? Section 18.1-278 makes it an offense for any person to give, *offer or promise* an officer a gift with intent to influence his vote on any matter which *is or may be then pending*, or may come *or be brought before him* in his official capacity.

It is thus the giving (before the vote is cast) or the offering or promising (before the vote is cast) of the gift with the purpose of influencing the officer's vote that constitutes the crime. It is not the rewarding of the officer *after the vote* for his favorable vote or even the actual pay-off pursuant to a previous promise which constitutes the bribery.

Section 18.1-279 makes it an offense for an officer to accept any gift or promise to make a gift "with an understanding that his vote . . . shall be given on any particular side of any question which is or may be by law before him in his official capacity."

It is thus the acceptance (before the vote is cast) of a gift or promise to make a gift with the understanding that he will vote a certain way that constitutes the crime. It is not the *casting of the vote* or the acceptance of the gratuity *after the vote*, whether or not in pursuance of a previous understanding, that constitutes the bribery.

This is made clear by the case of *Ford* v. *Commonwealth*, 177 Va. 889. There, the Virginia Court, in dealing with the Virginia bribery statute, said:

> ". . . It prohibits three specific acts,—the giving of a bribe, the offer of a bribe and the promise of a bribe, any one of which is a complete crime in itself. It applies where either of such acts are intended to influence the officer on any 'matter, question, cause, or proceeding' which may be pending, or on any 'matter,

question, cause or proceeding' which 'may by law come or be brought before' him in his official capacity, and consequently applies to present causes or proceedings and to causes or proceedings which may arise in the future.

"[3, 4] The statute places the corrupt gift, offer, or promise all on the same plane. It defines each of such acts as bribery and provides the same punishment. An attempt to corrupt, evidenced by an offer or promise of a gift, constitutes bribery on the part of the offeror or promisor as fully and completely as if a corrupt gift had been made and accepted. *The gist of the offense is the criminal intent to undermine the proper and orderly administration of justice. The crime is committed by the making of the corrupt offer.*" 177 Va. 889, 893 (Emphasis added)

Later the Court again made it clear that the crime is complete when the offer of the bribe is made:

"The defendant finally contends that the indictment charges only an attempt to commit the crime of bribery, and that the verdict of the jury finding her 'guilty of bribery as charged in the indictment' is contrary to the charge of an attempt. This contention has been answered by what we have already said,—that the offer or promise of a gift in an attempt or endeavor to bribe is as much bribery as a gift actually made for the corrupt purpose.

"The indictment specifically alleges, in the language of the statute, an offense which constitutes bribery. Its last clause reciting that the defendant 'in manner and form aforesaid did attempt and endeavor to bribe,' read, as it must be, in connection with the preceding allegations, charges bribery as defined in the statute * * *" 177 Va. 889, 895.

So, in this case, if any act of bribery was committed, it had to be committed *prior* to the vote on the rezoning

taken on July 26, 1962, and when the promise of the bribe and the agreement to accept the same were made the crime of bribery *was completed*, and thereafter there could be no overt act to effect the conspiracy to commit that crime.

We do not say that the evidence of the vote by Parrish or evidence that he subsequently accepted the stock may not have been evidence admissible against him, or that Parzow subsequently delivered the stock would not have been evidence against Parzow, with respect to an alleged bribe (and if coupled with proper evidence of a prior agreement, with respect to the alleged conspiracy), but we do say that evidence of such action on the part of one of them would not have been evidence against the other because the object of the conspiracy with which they were charged—if said conspiracy existed—had, of necessity, already been accomplished and, *for the same reason, such actions on the part of either of them could not be overt acts to effect the object of such conspiracy.*

Under the cases it is clear that the overt acts alleged in the Indictment cannot be acts occurring after the object of the conspiracy has been attained.

See *Bollenbach* v. *United States*, 326 U.S. 607, where it was held that one could not be convicted of having conspired to transport stolen securities across state lines on proof that he helped to dispose of the stolen securities after the interstate transportaion was concluded. As the lower Court said in that case, "there could be no conspiracy after the object of the conspiracy had been attained."

See also *United States* v. *Ehrgott*, 182 Fed. 267, where the Court said "The defendants are clearly right in saying that the overt act cannot succeed the completion of the contemplated crime" and also *Lonabaugh* v. *United States*, 179 Fed. 476 decided by the Circuit Court of Appeals for the Eighth Circuit, the opinion being rendered by then

Circuit Judge Van Devanter, later Justice Van Devanter. In the latter case the defendants were charged with conspiring to defraud the United States of possession and title to certain public lands by means of fraudulent entries under the public land laws. The overt acts alleged were submitting false proofs and, after securing the patents, having them recorded in the appropriate clerk's office and thereafter conveying the lands to a corporation.

After concluding that the first overt acts occurred more than three years prior to the indictment and were therefore barred by statute of limitations the Court then considered the subsequent overt acts. The Court said:

> "The subsequent acts are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it. As to the possession, it is enough to say that it passed from the United States when the entries were secured; and as to the right of possession, it is enough to say that it passed from the United States in a qualified sense when the entries were secured and passed unqualifiedly with the title. When, then, did the title pass from the United States? To this there can be but one answer, which is that given in United States v. Schurz, 102 U.S. 378, 26 L. Ed 167. (The issuance of the patent)
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> * * *
>
> "But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands but included the transfer of them to the corporation and that until both of these things were done the

object of the conspiracy was not effected. Passing the question of whether or not the indictment charges the object of the conspiracy so broadly, and treating the evidence as sufficient in that regard, we come at once to test the contention in the light of the statute. Section 5440 does not interdict all conspiracies, but only when those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose,' and then only one or more of the conspirators do *some* 'act to effect the object of the conspiracy.' It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some unlawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt acts be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured. See United States v. Keitel, 211 U.S. 370, 391, 29 Sup. Ct. 123, 53 L. Ed. 230."

See also *Ex Parte Black*, 147 Fed. 832, affirmed 160 Fed. 431, where the overt act falling within the period of limitations was the payment to alleged conspirators for services previously rendered in conspiring to defraud the United States.

The cases forbiddnng the use of admissions by one conspirator as evidence against the others in cases where the

admissions are made after the object of the conspiracy has been attained (that is to say when the offense the parties are charged with conspiring to commit has been completed), *Krulewitch* v. *U. S.*, 336 U.S. 440; *Thompson* v. *United States*, 227 F.2d 671, and the like, support the proposition here advanced. Such admissions are admissible against coconspirators on the theory that they are acts of an agent participating in the conspiracy and therefore are admissible against all. Since the Courts unanimously agree that once the object of the conspiracy has been attained, admissions of one conspirator thereafter made are not admissible against the other, it must be that such acts (admissions) are not acts in furtherance of the conspiracy for which all are responsible. It necessarily follows that other acts after the object of the conspiracy has been attained cannot be the required "overt acts to effect the conspiracy."

Note particularly *Krulewitch* v. *U.S., supra, Ex Parte Black supra*, and *Lonabaugh* v. *United States, supra,* where the courts rejected the theory that there was some continuing conspiracy (other than the specific conspiracy consisting of the Federal offense), such as one to conceal the crime or to distribute the fruits of the crime, etc., that would support either the admissibility of such evidence or the consideration of such acts as the required overt acts.

C. Count Two is Fatally Defective Because of Vagueness and the Failure to Allege Facts Constituting the Offense Charged With Reasonble Particularity of Time, Place and Circumstances.

The Court of Appeals stated that since identical and concurrent sentences were given to both defendants, it found no need to consider problems raised in connection with the substantive count. However, it touched vaguely on this

serious point by stating that it was "convinced that the indictment was sufficient to satisfy the principles established in *Brokow* v. *United States*, 368 F.2d 508; *United States* v. *Chunn*, 347 F.2d 717; *United States* v. *Martell*, 335 F.2d 764; and *Finn* v. *United States*, 256 F.2d 304;" and by referring to the bill of particulars furnished in this case.

A comparison of Count Two of the indictment in this case with the indictments in the cases cited by the Court of Appeals clearly reveals the insufficiency of the indictment in this case.

Here the indictment reads:

> "The Grand Jury Further Charges:
>
> "That from on or about November 1, 1961 and continuing to on or about January 1, 1963, in the Eastern District of Virginia and within the jurisdiction of this Court, the defendants
>
> John P. Parrish and Isadore Parzow
>
> did travel in interstate commerce, use facilities in interstate commerce, and willfully cause the travel in interstate commerce and the use of facilities in interstate commerce with the intent to promote, manage and carry on and to facilitate the promotion, management and carrying on of an unlawful activity, to-wit; bribery in violation of the laws of the Commonwealth of Virginia, to-wit:
>
> §§ 18.1-278 and 18.1-279 of the Code of Virginia, and did thereafter perform acts to facilitate the promotion, management and carrying on of the said unlawful activities.
>
> "All in violation of Title 18, United States Code, Sections 1952 and 2."

* * *

This count simply parrots the language of the statute itself. It states no specific facts at all which, if true, would establish that the defendants had in fact committed the crime charged and it is most indefinite as to when the offense was supposed to have been committed.

Specifically, what acts of travel were performed by the defendants, and with reasonable definiteness when did they take place? What acts of travel and what use of facilities in interstate commerce were caused by the defendants? Whom did the defendants bribe?—a policeman?, a judge? Did one of them bribe the other, if so, which one? Did one of them accept a bribe—if so which one? What act was performed to facilitate the illegal activity?

In the cases cited by the Court of Appeals the indictments were replete with facts as to time, place and circumstances.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and *definite* statement of the essential *facts* constituting the offense charged.

It is an elementary rule of criminal pleading that the accused is entitled to an indictment which does more than simply follow the wording of the statute which is alleged to have been violated. In the landmark case in this area, *United States* v. *Cruickshank*, 92 U.S. 542, it was held that, where the definition of an offense includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species and descend to the particulars. As this Court there stated:

> "A crime is made up of acts and intent; and *these must be set forth in the indictment with reasonable particularity of time, place and circumstances.*" (Emphasis supplied) 92 U.S. 542, 558.

See also *United States* v. *Britton*, 107 U.S. 655; *United States* v. *Hess*, 124 U.S. 483; and, generally, Anderson's *Wharton's Criminal Law and Procedure*, Vol. IV § 1792.

The reasons for this constitutional requirement of reasonable certainty in indictments have been stated in many different ways. It has been said that an accused has a substantive due process right to be informed in simple, understandable language of the crime with which he is charged and *the acts* constituting the crime in sufficient detail to enable him to prepare his defense and to be protected in the event of double jeopardy. *Wong Tai* v. *United States*, 273 U.S. 77, 80 (1927). It is also said that reasonable definiteness in an indictment is necessary in order to enable the trial court to make accurate rulings on the admissibility of evidence. See *Wharton's, supra.* The charge must be stated with as much certainty as the circumstances of the case will permit and it must be *so specific* as to enable an accused in the event further criminal proceedings are brought against him, to show to what extent plea of former acquittal or conviction may be applicable. *Hagner* v. *United States*, 285 U.S. 427, 431 (1931). Perhaps most importantly, "this constitutional right is based upon the presumption of innocence and . . . it requires such definiteness and certainty in the charge, as will enable a presumptively innocent man to prepare for trial." *Wharton's, supra.*

This is a due process requirement of the Sixth Amendment to the United States Constitution. In *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948), this Court in reversing a conviction from a state court, observed:

> "No principle of procedural due process is more clearly established than that *notice of the specific charge*, and a chance to be heard in a trial of the issues raised by that charge, if desired, *are among the constitutional rights of every accused in a criminal*

proceeding in all courts, state or federal." (Emphasis supplied)

In this holding, this Court was reiterating a decision of some 50 years earlier. *Hodgson* v. *Vermont,* 168 U.S. 262, 268-269 (1897). And, more recently, in *Russell* v. *United States,* 369 U.S. 749, 766 (1962), this Court repeating its holding in *Cole* v. *Arkansas, supra,* stated precisely the vice of such a vague indictment (and, incidentally, clearly indicated why a bill of particulars was not a constitutional curative):

> "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole* v. *Arkansas,* 333 U.S. 196, 201-202."

Nor could even a *valid* Bill of Particulars, cure Count II. The Constitutional vice of allowing an indictment to be cured by a bill of particulars is that it permits the District Attorney to substitute his judgment for that of the grand jury. Assuming possible interstate acts in the period involved, the grand jury could indict because of one, the trial could be held on the second and a conviction justified on appeal because of yet a third. This can't be the law; and, of course, it is not. Bills of Particulars necessarily presuppose an indictment or information good against a motion to quash. *United States* v. *Smith,* 16 F.R.D. 372, 374 (W.D. Mo. 1954) (Opinion by Justice Whittaker). And a bad indictment, conformably with the Sixth Amendment to the United States Constitution, may not be saved by

a bill of particulars. As long ago as *Ex parte Bain,* 121 U.S. 1, (1887), this Court nullified an attempt to augment a defective indictment saying:

> "Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . ."

More recently, in *Stirone* v. *United States,* 361 U.S. 212, 217 (1961), this Court observed:

> "The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

And, even later, in *Russell* v. *United States,* 369 U.S. 749, 769-770 (1962), this Court commented again:

> "It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment . . . To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

It is submitted that the same rationale must apply here. Perhaps an indictment more specific than the one in question could be *improved* by a bill of particulars. One as vague as this one, however, cannot be *saved* by such a device.

D. COUNT TWO IS VOID FOR DUPLICITY AND SHOULD HAVE BEEN DISMISSED.

In Virginia the offering of a bribe to a public official is one offense. § 18.1-278 of the Code of Virginia. The acceptance of a bribe by the public official is a different crime. § 18.1-279 of the Code of Virginia.

In this case, Count Two of the indictment, as implemented by the bill of particulars, charges the two defendants with using interstate facilities, one with the intent to offer a bribe and the other with the intent to accept a bribe, and thereafter performing acts to carry out these separate offenses.

Rule 8(a) of the Federal Rules of Criminal Procedure provides that two or more offenses may under certain circumstances be charged in the same indictment "in a separate count for each offense."

It is clear that if two or more separate and distinct offenses are charged in one count, the count is void for duplicity and is subject to a motion to dismiss. See *United States* v. *Bachman*, 164 F.Supp. 898 where the court said:

> "There is no doubt, or dispute, that each count of an indictment must contain no more than one offense, and if there are two or more separate and distinct offenses charged in one count, the indictment becomes subject to a motion to dismiss." 164 F.Supp., 898, 900.

In *United States* v. *Dietrich*, 126 Fed. 664, it was held that two persons cannot be severally charged in the same indictment in a single county, the one with agreeing to receive a bribe as a member of Congress and the other with agreeing to give such bribe, since the acts of each constitute distinct and several offenses.

It is obvious that two defendants could not be charged, in the same count of an indictment, under § 1952 of Title 18, United States Code, with traveling in interstate commerce, one with the intent to commit extortion and the other with the intent to commit arson, and thereafter performing acts to carry out these separate offenses.

Here, the two separate defendants were improperly charged in the same count of the indictment with using interstate commerce with the intent to commit what under the law of Virginia are two separate offenses. They are, therefore, charged in the same count with separate and distinct violations of § 1952 of Title 18 of the United States Code.

This points up that, by attributing to the word "bribery" as used in § 1952 a general indefinite meaning encompassing some concept of general wrongdoing, such as the accomplishing of a result—here a rezoning by means of bribery or the use of the fruits of the bribery, the Court of Appeals has fallen into a misconstruction and misapplication of § 1952.

§ 1952, a criminal statute that must be strictly construed, makes unlawful the use of interstate facilities with the intent to, and thereafter performing an act to carry out certain activities *in violation of the laws of the State in which committed.* It is inseparately tied into the crime as defined by state law and does not embrace a general concept of wrongdoing that may be deemed objectionable. When the Court of Appeals said in *Weschler*, the companion case, that "the State crime serves 'only as a background identification of the unlawful activities' " and held that the wrong was not done until the rezoning was accomplished it read into Section 1952 a meaning which is not there. Its

misinterpretation and misapplication of the federal statute permeates several of the points we present in this petition.[1]

IV.

The Court of Appeals has Misinterpreted and Applied Section 1952 of Title 18 in Affirming the Conviction When There was no Evidence of any Illegal Activity After the Use of Interstate Facilities.

The federal crime for which the defendants have been convicted is using interstate facilities with the intent to carry on an illegal activity (bribery in violation of the laws of Virginia) *and thereafter* performing acts to facilitate the promotion, management and carrying on of such unlawful activity. It was not, *and under the statute it could not have been*, the carrying on of such illegal activity and *thereafter* using interstate facilities. (It is to be noted that the indictment was couched under paragraph (3) of § 1952 and not under paragraph (1) relating to the distribution of the proceeds of an unlawful activity.)

By its Bill of Particulars, the Government specified no instances of travel in interstate commerce and limited the charge in the indictment to the use and the causing of the use of the facilities of the United States mails in interstate commerce on seven separate occasions, the earliest of which was on or about July 31, 1962. The evidence establishes that the first mailing that can be said to have been caused by the defendants with the required intent was on August 17, 1962 since the first mailing on July 31, 1962,

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[1] The Case of *United States* v. *Kubachi*, from which the Court of Appeals quoted in making the above statement, was a prosecution under paragraph (1) of Section 1952 which deals with the distribution of the proceeds of an illegal activity. Of course in such a prosecution the state crime can serve only as "background identification" of the illegal activity. Here the prosecution is under paragraph (3) which deals specifically with the carrying on of the illegal activity itself.

was the inadvertent error on the part of a file clerk in violation of express instructions.

Now, the key dates in this case are as follows:

July 23, 1962, at which time it was agreed between Parzow and Parrish that the former would purchase stock for the latter (which transaction the defendants claimed to be the result of a bona fide loan and the government claimed to be a bribe on the part of Parzow in return for the expected favorable vote of Parrish on the rezoning matter).

July 26, 1962, the date on which Parrish cast his vote in favor of the rezoning.

August 7, 1962, the date the money to purchase the stock was placed to the credit of Parrish with Balogh and Company stock brokers.

August 14, 1962, the date of the first use of interstate facilities by the mailing of directions from Balogh and Company to the transfer agent in Silver Springs, Maryland, to transfer 1000 shares of Kent Washington stock to John Parrish.

As we have pointed out in Part III B of this petition, under the laws of the Commonwealth of Virginia, the crime of bribery, both on the part of the briber and on the part of the bribed, is complete when the offer of the bribe is made and when the promise of the bribe is accepted. It is *not* the payment or the acceptance of the promised payoff after the action for which the bribe was offered has been taken by the officer. See *Ford* v. *Commonwealth, supra.*

Now the alleged bribery which the government sought to establish in this case was with respect to the vote on a rezoning matter in which defendant Parzow was inter-

ested, which came before and was acted upon by the Board of Supervisors *on July 26, 1962, at which time the vote Parrish was allegedly bribed to cast was cast.*

Obviously an offer of a bribe to an officer to influence his vote on a matter to come before him cannot be made after the vote has been cast and he cannot accept a bribe, or the promise of a bribe, with the understanding that he will vote a certain way on a matter to come before him *after* he has already cast his vote.

Here, if Parzow had offered a bribe to Parrish to influence his vote on July 26, 1962 he had to do so *on or prior to* July 26, 1962. Likewise if Parrish had agreed to accept a bribe with the understanding that he would on July 26, 1962, deliver his vote in favor of the rezoning, he had to do so *on or prior to* July 26, 1962. That offense could not have been committed subsequent to August 14, 1962, the date of the first use of interstate facilities alleged by the indictment as implemented by the bill of particulars and supported by the evidence in this case.

Even if it could be said that the substantive offense condemned by the federal statute embraces the actual delivery of the promised payoff, this still ante-dates the first use of the mails which could be charged to either of these defendants (August 14—see exhibit 42) for the payoff became complete when the funds were delivered to Balogh and Co. and placed to the credit of defendant Parrish on August 7, 1962. (See exhibit 6.) What Balogh and Co., as agent for Parrish, Suburban Trust Co., as transfer agent, or Parrish himself thereafter did with such proceeds had nothing at all to do with the alleged unlawful activity.

Since the illegal activity alleged to have been carried on by the defendants in violation of the laws of Virginia had all been completed prior to the first use of interstate facili-

ties it follows that there has been no violation of § 1952. And since there has been no proof of any conspiracy (agreement) other than the implication that the parties conspired (agreed) to do what the evidence showed they did do, the conviction on the conspiracy count must fall because what they did do was not a violation of § 1952.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

WALTER E. ROGERS
FRANK W. HARDY
GEORGE R. HUMRICKHOUSE
Counsel for John P. Parrish

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APPENDIX A

Constitutional provisions and statutes involved:

A. Constitutional Provisions

Fourth Amendment

(Security from Unwarrantable Search and Seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

(Right to Speedy Trial, Witnesses, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

B. Statutes

Title 18, United States Code:

Section 2

2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Section 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punish-

ment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 1952

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Code of Virginia:

Section 18.1-278

§ 18.1-278. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

Section 18.1-279

§ 18.1-279. Acceptance thereof by Officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the peni-

tentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,364.

United States of America,
Appellee,

versus

Isadore Parzow,
Appellant.

No. 11,398.

United States of America,
Appellee,

versus

John P. Parrish,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued November 7, 1967. Decided February 5, 1968.)

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

Thomas R. Dyson, Jr., (Raymond W. Bergan and Williams & Connolly on brief) for Appellant Parzow, and Walter E. Rogers (Frank W. Hardy and George R. Humrickhouse, and Williams, Mullen & Christian on brief) for Appellant Parrish, and John D. Schmidtlein, Assistant United States Attorney, (C.V. Spratley, Jr., United States Attorney, Roger T. Williams, Assistant United States Attorney, and Edward T. Joyce, Attorney, Department of Justice, on brief) for Appellee.

CRAVEN, Circuit Judge:

This case, like *United States* v. *Wechsler,* .....F.2d..... (4th Cir. 1967), decided today [Appendix B pp. 10-27], involves the bribery of a member of the Board of Supervisors of Fairfax County, Virginia, in violation of 18 U.S.C. § 1952. John P. Parrish, an attorney and member of the Board of Supervisors, and Isadore Parzow, a real estate developer, were convicted under a two-count indictment of conspiring to violate and of substantively violating the statute. From the evidence and under proper instructions, the jury could have found that Parzow and Parrish made an agreement whereby Parrish voted in favor of rezoning a tract of land to permit its use as a shopping center. In exchange for that vote Parzow bought 1,000 shares of Kent-Washington stock for $5,250.60 from a broker in Washington, D.C. and caused the certificates to be mailed to Parrish in Virginia. Parrish accepted delivery of the shares by signing a receipt and returned it by mail to the broker in the District of Columbia. As we more

fully explained in *Wechsler, supra,* facts such as these contain all the elements necessary to support the convictions for conspiracy and we affirm.[1]

The appellants urge that a charge of conspiracy to commit bribery cannot be maintained when the only persons involved are the persons who give and who receive the bribe. They place great reliance on cases which hold that where cooperative action is necessary to commit the substantive offense, a preliminary agreement between the same parties to commit the offense cannot be punished as a conspiracy,[2] but their reliance is misplaced. We have no occasion now to question the thrust of those cases for, as we pointed out in *Wechsler,* the defendants are not charged with a conspiracy to commit bribery, but rather with a conspiracy to violate § 1952.

We have given careful consideration to the other assignments of errors and find nothing in any of them to justify reversal or a new trial. We have no doubt that the use of facilities in interstate commerce was sufficiently related to the carrying on of the unlawful activity. *See, United States* v. *Wechsler, supra* at ..... n.4; *United States* v. *Wingo,* ..... F.2d ..... (6th Cir. 1967); *United States* v. *Hawthorne,* 356 F.2d 740, 742 (4th Cir. 1966). Nor do we think that the trial court improperly refused the motion for change of venue. *See, Rees* v. *Peyton,* 341 F.2d 859 (4th Cir. 1965). And we are convinced that the indictment was suffi-

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[1] Since identical and concurrent sentences were given to both defendants on each count, we find no need to consider problems raised in connection with the substantive counts. *Hirabayashi* v. *United States,* 320 U.S. 81, 85 (1943); *Gorin* v. *United States,* 312 U.S. 19, 33 (1941); *Brooks* v. *United States,* 267 U.S. 432, 441 (1925); *United States* v. *Wechsler,* ..... F.2d ..... (4th Cir. 1967).

[2] *E.g., Gebardi* v. *United States,* 287 U.S. 112 (1932) (Mann Act); *United States* v. *Holte,* 236 U.S. 140, 145 (1915) (bigamy and dueling); *United States* v. *N.Y. Central R.R.,* 146 Fed. 298 (S.D.N.Y. 1906) (bribery); *United States* v. *Dietrich,* 126 Fed. 664 (D. Neb. 1904) (bribery).

cient to satisfy the principles established in *Brokaw* v. *United States*, 368 F.2d 508 (4th Cir. 1966); *United States* v. *Chunn*, 347 F.2d 717 (4th Cir. 1965); *United States* v. *Martell*, 335 F.2d 764 (4th Cir. 1964); and *Finn* v. *United States*, 256 F.2d 304 (4th Cir. 1958).[3]

Affirmed.

WINTER, Circuit Judge, concurring:

I do not find in this case the infirmity which caused me to dissent in United States v. Wechsler, et al. (No. 11,331, etc.), decided this day.

Accordingly, I join in the judgment of the Court and the opinion in support thereof.

[3] Because of the bill of particulars furnished in this case, *United States* v. *Chase*, 372 F.2d 453 (4th Cir. 1967), is not in point. *See also*, *Cohen* v. *United States*, 378 F.2d 751 (9th Cir. 1967).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,331.

United States of America,
Appellee,

versus

Nathan Wechsler, et al
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. OREN R. LEWIS, DISTRICT JUDGE.

(Argued November 7, 1967. Decided February 5, 1968.)

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

David I. Shapiro (Frank F. Flegal and Dickstein, Shapiro & Galligan on brief) for Appellants in Nos. 11,331 and 11,355; Thomas R. Dyson, Jr., (Raymond W. Bergan and Williams & Connolly on brief) for Appellant in No. 11,352; E. Waller Dudley (Boothe, Dudley, Koontz, Blankingship & Stump on brief) for Appellants in Nos.

11,347 and 11,348, and Leroy E. Batchelor for Appellant in No. 11,356, and Philip Wilens & Edward T. Joyce, Attorneys, Department of Justice, (Charles Ruff & Jeremy Zimmermann, Attorneys, Department of Justice, and C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

CRAVEN, Circuit Judge:

Involved here is a scheme by certain partners in a real estate development company (Nathan Wechsler, Sigmund Goldblatt, George Faigen, and Seymour Faigen) to bribe two members of the Board of Supervisors of Fairfax County, Virginia, (Robert Cotten and Claiborne Leigh) to vote for the re-zoning of land in which the partnership was interested. Goldblatt, Cotten, Leigh and George Faigen appeal from their convictions for substantively violating 18 U.S.C.A. § 1952(a)(3) and for conspiring to violate the same statute; Wechsler and Seymour Faigen were acquitted on the substantive count and appeal from their convictions on the conspiracy count. The central question presented is whether the offense of using a facility in interstate commerce to promote, manage, establish, or carry on bribery and thereafter performing an act to promote, manage, establish, or carry on bribery is to be equated with, and limited by, the state law of bribery. We think not and affirm the convictions of all appellants.

In 1960, the developer-defendants were interested in procuring a zoning change from residential to mobile homes for 84.3 acres of land in Fairfax County which they wanted to use as a trailer park. Sufficient evidence was introduced at trial for the jury to find the following facts. On March 9, 1960, George Faigen filed an application for the re-zon-

ing. A year later, but before the Board of Supervisors had acted upon the application, the four defendant-partners placed a check for $5,500 in escrow in the Security Bank of Washington for John C. Somers, an attorney who often handled zoning cases in Fairfax County on a contingent fee basis, conditioned upon favorable action by the Board. Two months later, on July 26, 1961, the Board acted favorably on Faigen's application on the affirmative votes of Leigh, Cotten, DeBell[1] and another. On August 7, the developer-defendants instructed the Security Bank to release the $5,500 check to Somers who deposited it to his own account on August 18, the day on which he was notified by the bank. Somers was instructed by Leigh to run the check through his own account and then make out a check for the same amount to Leigh, and did so. Somers had performed no work for developer defendants at any time, and in 1961 he knew none of them except Goldblatt.[2] Leigh deposited the check to his account on August 19, and on August 22 he wrote a check to DeBell for $1,308.33; on August 23, he wrote a check to himself for $1,333; and on September 9, he wrote a check to Cotton for $1,000 Cotten's secretary entered the $1,000 check as a legal fee in Cotten's checkbook and receipts book and deposited the check to Cotten's account on September 15. On September 13, 1961, Congress enacted 18 U.S.C. § 1952. Because the state courts of Virginia set aside the original Board action, it was necessary for George Faigen to file a new application on June 20, 1962. This second application was considered by the Board on July 25, 1962, and again it was approved,

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[1] Acquitted below.

[2] Somers also testified that he had not reported the check as income on his 1961 tax return and that he had invoked the Fifth Amendment six times before the Grand Jury after which he had been given immunity.

this time on the affirmative votes of Cotten, Leigh, DeBell, and two others. Three letters, two by Goldblatt and one by George Faigen, connected with the effort to procure the re-zoning were mailed on June 17 and 18 and on July 21, 1962.

The most serious argument advanced by the appellants, and the one on which most of their other arguments depend, is that their crime was complete before the statute was enacted. We disagree. Their theory is that under Virginia law the crime of bribery is complete upon the giving, offering, or promising of a bribe even though the official act to be done in consideration therefore is to occur in futuro. The fallacy in their argument lies in a too heavy reliance on state law. The state crime serves "only as a background identification of the unlawful activities." *United States* v. *Wingo*, ...F.2d..... (1967); *United States* v. *Kubacki*, 237 F. Supp. 638, 643 (E.D. Pa. 1965). We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete*. But, their crime was not yet completed. Their activities continued beyond that point and, indeed, beyond the date on which the statute was enacted. The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the re-zoning was accomplished and the accomplishment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which the statute is aimed. Thus, the *federal* crime continued until the rezoning was accomplished on July 25, 1962.

The statute was enacted on September 13, 1961; on Sept-

ember 15, Cotten caused the check from Leigh to be deposited in his bank account, and the jury could have found that this check was in payment for Cotten's vote. Depositing that check in a bank for collection was the use of a "facility in interstate or foreign commerce."[3] On July 25, 1962, Cotten voted in favor of the re-zoning. Thus, he used a facility in interstate commerce to facilitate the carrying on of bribery and *thereafter* performed the carrying on of bribery, squarely within the terms of the statute, after the statute was enacted. As applied to Cotten, then, the statute had no ex post facto effect.

By the same token, the conspiracy convictions of each of the appellants must be affirmed. Appellants argue that a new trial is necessitated by the trial judge's instruction that the jury could convict if one of the conspirators committed any of the several overt acts charged in the indictment, several of which were not acts in furtherance of *bribery* and occurred, under appellants' theory, after the conspiracy had ended. But in order to have convicted Cotten of the substantive offense, the jury must have found that he deposited his check from Leigh, and this was one

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[3] When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce. Banks have often been held to be involved in interstate commerce for other purposes. *E.g., NLRB* v. *Bank of America,* 130 F.2d 624 (9th Cir. 1942) (National Labor Relations Act); *Lorenzetti* v. *American Trust Co.,* 45 F. Supp. 128 (N.D. Cal. 1942) (Fair Labor Standards Act). Moreover, Government Exhibit No. 12, the check from Leigh to Cotten, shows that the check was drawn on a Virginia bank and bears the endorsement of a Washington, D. C. bank. Nor do we doubt that the evidence was sufficient for the jury to find the requisite statutory intent. *See, United States* v. *Wingo,* ..... F.2d ..... (6th Cir. 1967). To paraphrase our holding in an analagous situation, there must be some connection between the unlawful activity and the use of a facility in interstate commerce, but "we think it sufficient under section 1952 that the defendant knowingly caused to be transmitted interstate . . . proceeds of a [bribery] which was unlawful under the [Virginia] statute." *United States* v. *Hawthorne,* 356 F.2d 740, 742 (4th Cir. 1966).

of the overt acts to which the trial judge referred. Each member of the conspiracy is chargeable with acts performed by other members in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640 (1946).[4] Further, appellants were not charged with a conspiracy to commit *bribery*, but with a conspiracy to violate 18 U.S.C. § 1952.[5] Each of the overt acts listed in the indictment were acts which would have furthered this conspiracy and each was performed after the statute was enacted and before the conspiracy ended, according to our holding, on July 25, 1962, when the Board acted affirmatively on the re-zoning application.

On the other hand, rather serious problems are raised in connection with the substantive convictions of each of the appellants other than Cotten. But because we affirm their conspiracy convictions and because the sentences on each count are to run concurrently, a reversal of the substantive convictions would be fruitless. We, thus, find it unnecessary to resolve those problems.[6] *Hirabayashi* v. *United States*,

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[4] Since Seymour Faigen has been acquitted of the substantive count and since the punishment of the other appellants would not be affected, we decline to consider whether Cotten's commission of the substantive offense was in furtherance of the conspiracy so as to make all conspirators equally liable for the substantive offense as well as the conspiracy. *See Pinkerton* v. *United States*, *id* at 647; *United States* v. *McGuire*, 249 F. Supp. 43, 48 (S.D.N.Y. 1965).

[5] Appellants seriously urge that at the outset the trial judge construed Count I of the indictment to mean that they were charged with a conspiracy to commit bribery, and that later the theory was switched to read Count I as charging them with a conspiracy to procure a re-zoning by means of bribery. Since the indictment quite clearly charges a conspiracy to violate § 1952, such a switch, if indeed it occurred, would have entitled the appellants to no more than a continuance on the grounds of surprise. No such motion was made.

[6] While we do not decide the question, we note that there is a serious question as to whether any of the appellants, other than Cotten, used a facility in interstate commerce and *thereafter* performed an act prohibited by the statute. Sigmund Goldblatt and George Faigen both wrote and mailed letters after

320 U.S. 81, 85 (1943); *Gorin* v. *United States*, 312 U.S. 19, 33 (1941); *Brooks* v. *United States*, 267 U.S. 432, 441 (1925).

Many of the other arguments advanced by appellants are dependent upon the answer to the problem just discussed and, hence, fall with the statutory construction that we have adopted. However, there remain two arguments that merit brief mention. Appellant Leigh urges that it was error for the trial judge to require the defendants to agree on a trial location within the Eastern District of Virginia as a condition for fixing the place of trial somewhere within the district other than Alexandria under Fed. R. Crim. P. 18. But a motion for change of venue under Fed. R. Crim. P. 21(a) had already been denied; the condition was merely an attempt by the trial court to accommodate the defendants in keeping with the rule's mandate that the place of trial is to be fixed within the district "with due regard to the convenience of the defendant and the witnesses."

Second, appellants contend that it was error for the trial judge to limit the testimony of William DeMik, an attorney. DeMik, on direct examination, testified that Wechsler had asked him about Somers, that he had investigated and had reported to Wechsler that Somers was an attorney who was extremely well connected with the Board of Su-

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the date of the statute, but it is seriously urged that the only act that they can be said to have performed *thereafter* is the appearance of Lytton Gibson, an attorney, before the Board of Supervisors on behalf of the partnership. Although traditional agency concepts might support the theory that Gibson's act was the act of each of the partners, ordinarily such an appearance is precisely the kind of activity in which, as the trial judge charged, any citizen has the right to engage; there is serious doubt that this act was shown to be one which was done to promote bribery. Conversely, Claiborne Leigh was shown to have performed an act after the statute was enacted (*i.e.*, his vote), but it is doubtful that he was shown to have made use of a facility in interstate commerce before that act and after the effective date of the statute.

pervisors. He was then asked if he had given Wechsler any advice; at that point the trial judge interrupted and *sua sponte* interposed an objection. The offer of proof was that DeMik would testify that he had advised Wechsler to settle with Somers thus supporting defendants' theory that the $5,500 had been put in escrow as settlement of a legal fee due to Somers. We find it unnecessary to decide if exclusion of this testimony was error, for we find no effect on the substantial rights of the parties within the meaning of 28 U.S.C.A. § 2111. Dobrow, the fifth partner, testified that Somers had been employed as an attorney to assist in the zoning, that a fee of $15,500 had been discussed, that Wechsler had been delegated by the partners to annul the preliminary arrangements after Gibson, another attorney retained to work on the same matter, had refused to work with Somers, and that a $5,500 settlement had been arranged with Somers. Further, another witness testified that he had told Wechsler, after investigating, that Somers was a person not without influence and that he was reasonably certain that Somers "could be somewhat harmful." There is, then, very little that DeMik's testimony could have added to the jury's knowledge. Moreover, the contentions of the defendants were carefully spelled out in the charge to the jury. In these circumstances, we can find no prejudice justifying a new trial. *See, Harper* v. *United States*, 143 F.2d 795, 806 (8th Cir. 1944).

We have carefully considered the other numerous arguments advanced on behalf of all appellants and find them to be without merit.

Affirmed.

WINTER, Circuit Judge, dissenting:

I agree wholeheartedly that one of the general purposes of Congress in the enactment of 18 U.S.C.A. § 1952 was

"to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials." But in seeking to punish this class of wrongdoers, the government must be held to the exact class of transgressors whose activities Congress outlaws. To my mind, these defendants do not fall into this group.

The facts need not be extensively restated: only certain dates should be pointed up. The $5,500 bribe to accomplish favorable rezoning of the tract in question was removed from escrow and deposited to Somers' bank account on August 18, 1961. The next day it went into Leigh's bank account. From there, shares were disbursed to the three public officials who accomplished the rezoning. Specifically, one of them, DeBell (who was acquitted at the trial) received a check in payment on August 22, 1961; Leigh, one of the others, made disbursement to himself on August 23, 1961; and the final payment was made to a third, Cotten, by check dated September 9, 1961. Cotten's bookkeeper did not deposit Cotten's check until September 15, 1961. Meanwhile, § 1952 became effective September 13, 1961. Because the initial rezoning was set aside by the courts, repetition of the rezoning, *but without the payment of any additional bribe*, took place in June and July, 1962. In connection with the second rezoning, the United States mails were used on June 17 and 18 and on July 21, 1962.

The statute, which was the basis of the substantive count of the indictment and the violation of which was the object of the alleged conspiracy in the conspiracy count of the indictment, is set forth in the margin.[1] So far as per-

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[1] 18 U.S.C.A.

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

tinent here, the statute makes unlawful the conduct of one who uses any facility in interstate or foreign commerce, including the mail, *with intent to promote*, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of *bribery in violation of the laws of the Commonwealth of Virginia* and thereafter performs or attempts to perform the crime of bribery in violation of those laws. The Virginia statutes defining the criminal conduct constituting bribery are likewise set forth in the margin.[2] It is clear under Virginia law, as the ma-

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(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * * * "

[2] Code of Virginia (1960 Repl. Vol.):

"§ 18.1-278. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment, on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

* * * * * "

"§ 18.1-279. Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall

jority tacitly concedes, that the latest point in time at which the crime of bribery is complete is *not* when the public official commits the act for which he is bribed, but when the bribe is given and the official accepts the bribe payment.[3]

The essential difference between me and the majority is that I think that the statute means what it says when it requires that the use of interstate facilities be accompanied by an intent to violate state law. Both *United States* v. *Wingo*, ... F.2d ..... (6 Cir. 1967), and *United States* v. *Kubacki*, 237 F. S. 638 (E.D. Pa. 1965), support this position.[4] But in contravention of these authorities—and

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go out of this State and accept and afterwards return to and reside in this State any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgmet shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office."

[3] Of course, the Virginia statute also permits a prosecution based on events which occur earlier than the completed transaction, i.e., the offer to give a bribe, and the agreement to accept one. *Ford* v. *Commonwealth*, 177 Va. 889, 15 S.E.2d 50 (1940). For present purposes, however, my concern is properly directed only to the latest point in a complete transaction that criminality attaches.

[4] The "background identification" language in *Kubacki*, quoted in the majority opinion, must be placed in its proper context. It was not held in *Kubacki*, as the majority holds here, that it is unnecessary in determining whether § 1952 has been violated to examine the specific scope of the state law which the defendant is charged with having the intent to violate when using facilities of interstate commerce. To the contrary, an essential element of the holding in *Kubacki* is that under Pennsylvania law the crime of extortion is not completed until the actual payment is made, and that this payment was made after September 13, 1961. See 237 F. S. at 643 n. 7. The reasoning of the court was that although the public wrong effected by the extortion—the award of a

the plain language of § 1952—the majority apparently deems that use of interstate facilities in the loose context of some past violation of state law is sufficient, if subsequent conduct of the defendants can be said to violate the general purpose of § 1952 to protect the people from corruption of public officials.

The error of the majority is one of statutory interpretation, but as such it reaches constitutional magnitude. Under the operative facts as stated by the majority and repeated here, there can be no question (putting aside for the moment the check given to Cotten) but that the Virginia crimes of bribery and acceptance of a bribe were "complete and completed" prior to September 13, 1961—the effective

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parking meter contract—occurred before the effective date of § 1952, the illicit course of conduct under state law was not completed until the actual payment was made, and that, therefore, the use of facilities of interstate commerce after September 13 was made with the requisite intent *to violate state law*. Thus, the court stated:

> "Upon the adoption of § 1952 on September 13, 1961, the plan, contemplating as it did use of interstate facilities and interstate travel, became an unlawful conspiracy under federal law. Membership of the defendants in the theretofore federally innocent plan was then converted to membership in an unlawful conspiracy. *That conspiracy continued until the accomplishment of the last of its objects, delivery of the money and the clock. Id.*, at 643. (emphasis supplied)

The underscored language makes it clear that after the state crime of extortion had been completed by the making of the actual payment, the conspiracy to violate § 1952 must also necessarily terminate.

Similarly, *United States* v. *Wingo*, ... F.2d ..... (6 Cir. 1967), provides no support for the majority's approach of defining "unlawful activities" as used in § 1952 in federal terms, rather than according to state law. Indeed, in that case, which involved "travel in interstate commerce" to distribute the proceeds of prostitution, the Court explicitly recognized that "we are concerned by the terms of the statute [§ 1952] with an enterprise *unlawful under the laws of Tennessee." Id.*, at ..... And although the Court paraphrased the "background identification" language used in *Kubacki*, the context in which these words are used indicates that the Court meant something far different from what the majority suggests.,

date of § 1952. As will be later shown, the check given to Cotten requires no different conclusion. If the government had sought a conviction on the basis of the use of interstate facilities prior to September 13, 1961, so as to prove such use accompanied by the intent which § 1952 specifically requires, clearly the government would be seeking to give § 1952 retroactive application.[5] This the government could not do. U.S. Constitution, Art. I, § 9; *Bouie* v. *Columbia,* 378 U. S. 347 (1964). In allowing the government to circumvent this problem by reliance on uses of interstate facilities occurring after September 13, 1961, the majority has denied due process of law, because it has created by judicial fiat a federal crime not brought into existence by § 1952 itself, "the use of interstate facilities with intent to promote an illegal zoning." Such judicial enlargement of a penal statute, if applied retroactively, has the

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"At this point it becomes necessary to determine what the Travel Act requires in the form of intent. Under § 1952, travel, with a requisite intent plus a subsequent act in furtherance of that intent, would be all that is required to make out a violation. *United States* v. *Bergland,* 318 F.2d 159 (7 Cir. 1963) cert. den.; Cantrell, et al v. United States, 375 U. S. 861 (1963). The state crimes serve only as a background identification of the unlawful activities *in aid of which the proscribed travel was undertaken. United States* v. *Kubacki,* 237 F. Supp. 639 (E.D. Pa., 1965). The words 'with intent' obviously refer to the words immediately following, namely, 'to * * * distribute the proceeds of any unlawful activity.'" (emphasis supplied)

The difference in the "intent" required in *Wingo* and that required here is explained simply by the fact that the indictments in *Wingo* were brought under § 1952(a)(1), while the indictments in the instant case were brought under § 1952(a)(3). For present purposes, the critical aspect of the language in *Wingo* is that the Court considered that state law provides "background identification" to § 1952(a)(1) only in the sense that the gravamen of the federal offense is the use of interstate facilities with the intent to distribute the proceeds of an unlawful activity, *defined by state law.*

[5] As particularized, the indictment charges that the use of interstate facilities by use of the United States mails between the Commonwealth of Virginia and Washington, D. C. occurred on or about September 20, 1961, October 11 and 12, 1961, October 22, 1961, November 28, 1961 and July 17 and 18, 1962.

same effect as legislative enactment of an *ex post facto* law, which is constitutionally prohibited both to the states and to Congress (U. S. Constitution, Art. I, §§ 9 and 10), and has been held to violate the due process amendments. *Bouie* v. *Columbia, supra.* Because any use of interstate facilities to promote an illegal zoning was federally innocent—even if it occurred after September 13, 1961—before the majority's decision in this case, the violation of due process follows.

Any doubt about the construction to be afforded § 1952 is allayed by reference to *Kann* v. *United States,* 323 U. S. 88 (1944), and *Parr* v. *United States,* 363 U. S. 370 (1960), both of which arose under the mail fraud statute. In *Kann* the defendants perpetrated a fraudulent scheme, pursuant to which they obtained checks payable to them, which they cashed or deposited at a bank. The use of the mails charged as a violation of the federal statute was the mailing of the checks for collection by the banks which cashed them to the banks on which they were drawn. Prior to that mailing, the defendants had obtained affective control over the money which they sought and, as far as they were concerned, their fraudulent plan had reached its fruition and come to a complete rest. The mailing was done by the banks, which had no connection whatsoever with the fraud. The checks were mailed for the bank's own purposes. On these facts it was held that the defendants could not be convicted for violation of the mail fraud statute, because the mailing did not occur with the requisite intent to defraud.

In *Parr* the defendants obtained gasoline and other products and services for themselves by the use of a credit card of a School District which had authorized the defendants to use the card for the District's purposes only. The mail-

ings complained of were two invoices sent by the oil company to the District, and the District's check mailed back in payment. Again, it was found that the mailings by the outsiders were not an integral part of the scheme as planned and executed by the defendants, and that, as a matter of fact, it was completely immaterial to them what the oil company did about collecting its bill. As in *Kann*, the conclusion reached was that the mailing was without the requisite intent to further the scheme to defraud.

Both *Kann* and *Parr* clearly stand for the proposition that the mere concurrence of a violation of the general purpose which the relevant federal statute is designed to serve and a use of interstate facilities does not make an act, even though morally reprehensible and violative of state law, a federal crime. That Congress may have prohibited the use of interstate facilities to persons who use those facilities for the purpose of perpetrating frauds does not mean that Congress intends to outlaw that activity under federal law wherever the use of interstate facilities grants to the federal courts a jurisdictional basis to do so. *Cf. Carroll* v. *United States*, 326 F.2d 72, 85-86 (9 Cir. 1963). In this regard the following statement in *Kann* is quite pertinent: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S., at 94-95.

Similarly, as shown by the clear statutory language, Congress did not intend in § 1952 to reach all wrongs "on the people [effected] by corrupting public officials," but only those wrongs which are violative of specified state laws. The scope of Congressional power, and whether it is sufficiently broad to make unlawful the use of interstate fa-

cilities for the purpose of corrupting state officials, is not the question. I do not doubt that the power of Congress is this broad, just as I do not doubt that Congress can reach all fraudulent schemes which employ interstate facilities regardless of intent. But our inquiry here must be whether this power was so exercised. The plain wording of § 1952 demonstrates that it was not.

The check sent to Cotten merits special scrutiny. If the bribery of Cotten was complete on September 9, the date on which he received the check, it is obvious that under my interpretation of the statute, the clearing of the check through interstate facilities after September 13 could not constitute a violation of § 1952, because (1) this use of interstate facilities could not be made with the requisite intent to violate state law, and (2) no act in performance or attempted performance of the Virginia crime of bribery could be made *after* the use of interstate facilities, as required by § 1952. This, I think, is dispositive of the case. In the absence of evidence that Cotten knew that the check was worthless at the time he received it and delayed in making his deposit until he was informed that the check would not "bounce" (a position suggested, but not pressed by the government) there seems to be no reason to find as a matter of state law that the bribe was not completed on the date of receipt.[6] It would be unrealistic to infer repudiation of the check from mere delay in depositing it when the check was received pursuant to a prior agreement.

Assuming, however, that the bribe was not completed at the time of receipt, it seems abundantly clear that it was completed at the time of deposit. By placing the money in

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[6] Indeed, the record shows that Leigh, contemporaneously with drawing his check to Cotten, voided certain previously drawn checks so that the check to Cotten would be paid by the bank when presented.

his own account, Cotten evidenced an unequivocal intent to "accept" the illicit benefit, the gravamen of the offense under *Va. Code Ann.* § 18.1-279. Surely, a public official could be convicted of bribery if he accepted counterfeit money, believing it to be genuine. Similarly, even if a check which he accepted turn out to be worthless, he would still have accepted a bribe. Thus, collection of the check from the drawee bank occurred *after* the bribe had been completed—even if the bribe was not accepted until the time of deposit—and, accordingly, any use of interstate facilities after that time, specifically bank clearing operations, could not constitute a violation of § 1952 for the same reasons which apply if the bribe is deemed to have been completed on September 9.

But even if it is further assumed that as a matter of state law the bribe was not completed until the check had cleared, the same result should obtain, because as a matter of federal law the bank clearing operations do not constitute a use of interstate facilities as contemplated by § 1952. The specific teaching of *Kann* v. *United States, supra,* is that if the interstate mailing is merely collateral to the perpetration of a fraudulent scheme, such mailing is not sufficient to establish a violation of the mail fraud statute. Of course, subsequent decisions, e. g., *United States* v. *Sampson,* 371 U. S. 75 (1962), and *Pereira* v. *United States,* 347 U.S. 1, (1954), recognize that, under the mail fraud statute, use of the mails even after the victim's money has been obtained can be for the purpose of executing the scheme, and thus subject to prosecution, if it is "incidental to an essential part" of the scheme. But on whatever side of the rather vague line drawn by *Kann* and its progeny the bank clearing in the instant case might fall, and important difference in the mail fraud statute and § 1952 supplies a dispos-

itive answer. The mail fraud statute proscribes conduct where one "knowingly causes" the mail to be used for the purpose of executing the fraud, as well as use of the mail for that purpose. 18 U.S.C.A. § 1341. It was on the ground that each of the defendants "caused" the mail to be used that convictions were upheld in *Pereira* v. *United States, supra*, where the basis for prosecution was the deposit of checks. By contrast, § 1952 is limited to "uses [of] any facility in interstate or foreign commerce, including the mail." Therefore, the reasoning used in *Pereira* to limit the *Kann* holding is not applicable here.

In the expression of my views, little more need be stated. If I am correct in my interpretation of § 1952, the convictions on the substantive counts clearly cannot be supported. And if I am correct in my treatment of the substantive offenses, the conspiracy convictions, under the familiar principle that a conspiracy terminates upon the accomplishment of its unlawful objective, stand on no sureer footing. *Gruenewald* v. *United States*, 353 U. S. 391 (1957).

I would reverse the judgments and direct the entry of judgments of acquittal.

No. 4385

(Filed April 18, 1967)

Judgment and Commitment

United States of America

v.

John P. Parrish

On this 18th day of April, 1967 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy, 18USC371—count 1; using interstate facilities, 18USC1952 & 2—count 2 as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years as to each of counts one and two. Sentences imposed herein shall run concurrently and not consecutively.

IT IS ADJUDGED that an appeal having been filed, the execution of sentence is hereby suspended pending the outcome of said appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

OREN R. LEWIS
United States District Judge.

W. FARLEY POWERS, JR.,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,398

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN P. PARRISH,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

PETITION FOR REHEARING EN BANC

Pursuant to Rule 19 of the Rules of this Court the Appellant, John P. Parrish, respectfully requests that the Court grant a rehearing in this case En Banc and that it reconsider its opinion filed February 5, 1958. The grounds upon which Appellant relies are set out below.

The Appellant moves the Court for a stay of its mandate until this petition for rehearing is considered and acted upon by the Court and for ten days thereafter.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,398.

United States of America,
Appellee,

versus

John P. Parrish
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

Upon the motion of the appellant by his counsel, and for cause shown,

It is ordered that the issuance of a certified copy of the judgment in lieu of the mandate be, and the same is hereby, stayed pending action on the petition for rehearing en banc.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,398.

United States of America,
Appellee,

versus

John P. Parrish,
Appellant.

Order Denying Petition For Rehearing En Banc

Consultation with all of the members of the court discloses that six of the judges do not wish to rehear this case en banc and that Judge Bryan abstains.

NOW THEREFORE, IT IS ORDERED that the petition to rehear en banc is denied.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

/s/ HARRIS L. WINTER
United States Circuit Judge

Stipulations from Transcript of November 18, 1966

THE COURT: Haven't you got it very clearly from the head here that it was set up for the purpose of investigating rumors and alleged corruption and bribery and every other name you got out of Mr. Joyce in Northern Virginia? That is what he said, wasn't it? I don't know how you can go any stronger.

MR. BATCHELOR: Your Honor, I think the reason for going into this is to develop the knowledge that the Revenue Agents had as opposed to Special Agents.

THE COURT: What difference does it make what knowledge they had? I am not trying the case. I am only doing one thing here, determining whether any records he got from Mr. Claiborne Leigh were illegally obtained. That is all we are determining here, nothing else, in this hearing. You want to suppress them. The burden is on you to show they were illegally obtained and I will let you produce any evidence. But what has the name got to do with it? Whether it is Metro or Arlington-Fairfax investigation it doesn't mean anything.

MR. BATCHELOR: Let me ask him this.

BY MR. BATCHELOR:

Q Was this particular group that you were with unlike any other group you served with in the Internal Revenue Service?

THE COURT: What difference does that make? Won't you stipulate, Mr. Joyce. I mean I want to fully develop this, that this was a special group set up to investigate alleged failure to file income tax returns, allegedly coming from payoffs, bribery, extortion, everything you want to call it, is that right?

MR. JOYCE: That is correct.

THE COURT: All right. You can't get any more. That is what it was set up for.

MR. BATCHELOR: That is the stipulation in the record at this time?

THE COURT: Yes, sir, that is. I always did understand, from yesterday, that is what they were out to do. You gentlemen know it as well as I do. They were out to find all the evidence they could find in reference to people that they had under suspicion of violating the law and they were doing it by seeing whether they were reporting income on it. Now, if they can't do that, let's get to it legally.

* * *

THE COURT: To save all of you gentlemen a lot of trouble, the government may argue all they want to that is all they are interested in, but they won't convince me they were not interested in what Mr. Joyce said. If that is illegal, we can get to it. They had strong rumors, they had suspicions, they had reports from the FBI, Mr. Joyce said, of crookedness going on in Fairfax County, pay-offs, there was alleged bribery, both by the FBI and rumor, and that is what was said, and they were auditing tax returns of public officials, including others not indicted, for the purpose of seeing whether or not this alleged illegally obtained money was declared on their income tax. I don't think there is any doubt about that is what the evidence shows conclusively. Now, if they can't do it, that is one thing. So why do we go through all of this pinning down to niceties of whether this boy was engaged in an audit or whether he was engaged in getting the evidence? It is clear that the auditors turned their information over to the coordinator or the supervisor, that is what they had him for. The su-

pervisor discussed it, assimilated it. When they got all through with Mr. Joyce, it is clear they went over it with a fine-tooth comb to evaluate it to see if they had enough to present any indictments. They reached the conclusion that they did have enough in some cases, and they did present some indictments and here we are.

Now that is, reduced, in a nutshell, exactly what happened.

MR. JOYCE: That is exactly it.

THE COURT: Will you stipulate that is what happened?

MR. JOYCE: Yes, Your Honor, have been willing to do that for two days.

THE COURT: All right. The government now stipulates exactly what happened is what the Court finds from this evidence.

* * *